SUPREME COURT, U.S.
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No. 926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PETER L. SALEMI, *Petitioner*

v.

DUFFY CONSTRUCTION CORPORATION, *Respondent*

PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JOHN MAKTOS,
Counsel for Petitioner
MAKTOS & MAKTOS
3700 Massachusetts Ave., N.W.
Washington, D. C. 20016

Press of Byron S. Adams, Washington, D.C.

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Petitioner, Peter L. Salemi, respectfully prays that, pursuant to paragraph 2 of Rule 58 of the Revised Rules of this Court, a rehearing be granted of its order, entered in this case on February 28, 1966, denying the petition for a writ of certiorari to the Supreme Court of Ohio.

The petitioner respectfully shows as follows:

1. The following substantial ground was not presented in the aforesaid petition:

The Supreme Court of Ohio denied to petitioner constitutional due process by its action referred to in Point VII of the petition, page 117.

For convenient reference this point is attached hereto as Appendix A.

Under a contract between petitioner and respondent, the former, as subcontractor for the latter, the general contractor, undertook to excavate a construction site in the general control of respondent. While within the said site, petitioner was injured as a result of respondent's negligence. The question of fact whether petitioner was there at that time for respondent's benefit in the performance of the subcontract was submitted to the jury in view of probative evidence. The jury's affirmative answer on this question was approved by the trial court and by the intermediate appellate court. As a consequence of the jury's answer, both courts held that petitioner was an invitee and as such entitled to compensation.

The Supreme Court of Ohio reversed the lower court on the sole ground that petitioner was not an invitee but a licensee and that as such he could not recover. The basis for the reversal was that petitioner was there for his own benefit and not for that of respondent, a finding of fact contrary to the jury's finding on that issue. In the light of the existence of probative evidence, it is respectfully submitted that the Ohio Supreme Court's going behind the jury's finding on a question of fact constitutes a denial of the due process required by the U. S. Constitution.

Due process as applied to judicial proceedings envisages application of those rules and practice which have been established in our law for the protection of

private rights. Endicott-Johnson Corp. v. *Encyclopedia Press,* 266 U.S. 285, 288 (1924); *Pennoyer* v. *Neff,* 95 U.S. 714, 733 (1878).

> "The words 'due process of law,' when applied to judicial proceedings, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'" *Endicott-Johnson Corp.* v. *Smith,* 45 S.Ct. 61, 62 (1924).

Thus, cross-examination is one of the rules which is established in our law. Is the denial of the right of cross-examination a denial of the due process of law? An affirmative answer to this question was given in *Derewecki* v. *Pa. R. Co.,* 353 F. 2d 436 (1965).

Lest it be contended in connection with this point of due process that the case *sub judice* involves local Ohio law, it is pertinent to note that so did many of the cases cited in the petition for a writ of certiorari, but this fact did not prevent this Court from not only considering them but also reversing the judgment of the court below, *e.g., Butz* v. *Muscatine,* 8 Wall. 575 (1869), petition, p. 24 *et seq.*

2. Another point is that, with respect to a constitutional issue, the supervisory power of this Court to prevent diversity of decisions on such issues cannot be denied. This case involves a constitutional issue of great importance in the administration of justice as to which state courts—in the case *sub judice* the Supreme Court of Ohio—and federal courts of appeal are in conflict concerning the question whether an appellate court may, consistently with due process, reweigh a question of fact submitted to the jury by the trial judge and decide this factual question contrary to the jury's

finding. This is what was done by the highest court of Ohio in this case. On the other hand, the U. S. Court of Appeals, Eighth Circuit, again a court the decision of which can be reviewed only by this Court, held:

> "We must take that view of the evidence that tends to support the prevailing party, and must accept as established all reasonable inferences to be derived from such testimony. Jaben v. U. S., 349 F. 2d 913 (8th Cir., 1965)." *Babb* v. *U. S.*, 351 F. 2d 863, 866 (1965).

The "prevailing party" in both the lower Ohio courts was the petitioner. Not only did the said Supreme Court fail to "take that view of the evidence that tends to support the prevailing party" but it went so far as to deny due process by redeciding a question of fact contrary to the decision of the jury to which the trial judge had submitted the question of fact.

Conclusion

For the reasons set forth, petitioner prays that a rehearing should be granted in this case.

Respectfully submitted,

JOHN MAKTOS,
Counsel for Petitioner

MAKTOS & MAKTOS
3700 Massachusetts Ave., N.W.
Washington, D. C. 20016

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Bearing in mind the requirements in Rule 23.4 and the heavy burden of responsibility of this Court, I also wish to express my deep appreciation and gratitude for the Court's indulgence in connection with the petition for a writ of certiorari which, in an endeavor to attain adequacy, may have imposed on the Court reading beyond the periphery of accommodation envisaged by another requirement in the said rule, brevity.

JOHN MAKTOS,
Counsel for Petitioner

MAKTOS & MAKTOS
3700 Massachusetts Ave., N.W.
Washington, D. C. 20016

APPENDIX A

VII. The Supreme Court of Ohio, by invading the functions of the jury, denied to petitioner his rights under Amendment VII to the Constitution, as well as under the common law, to have a fact tried by a jury, where the question of fact, whether the petitioner's visit to the construction site was for a purpose incident to the performance of the contract between petitioner and respondent and for the benefit of respondent, had been submitted as a fact to the jury in view of the existence of probative evidence and where the Supreme Court of Ohio undertook to reweigh the evidence concerning this issue of fact and made a finding contrary to that of the jury on this issue.

The question of fact whether petitioner made the Sunday visit to the construction site for a purpose incident to the performance of the contract between him and respondent and for the benefit of respondent was submitted to the jury. This question was tried by the jury and was answered in the affirmative. As shown by the record evidence in the Statement of Facts, *supra,* and in point III, *supra,* there was probative evidence to go to the jury. It is not necessary to support this point by a contention on the part of petitioner that the evidence on this issue was sufficient to justify the trial judge to find, as a matter of law, in favor of petitioner on this point. Petitioner, however, does believe that the evidence on this point was so overwhelming in his favor that it would have justified such a finding by the trial judge and that the respondent got the better of it in this case by having this issue submitted to the jury as a question of fact. The trial court approved the verdict and consequently the finding of the jury on this issue.

The Court of Appeals found, "After a careful consideration of all the evidence in the light of the applicable principles of law" that "There is a sufficiency of evidence to establish that plaintiff's [petitioner's] *purpose in being upon the premises* [on his Sunday trip] *was ultimately connected with the proper performance of the subcontract be-*

tween plaintiff and defendant [respondent]" and also that *"The evidence establishes a direct pecuniary benefit to defendant by such compliance on the part of the plaintiff,"* 197 N.E. 2d at 403, and *infra,* p. 20a. (Emphasis supplied).

The *majority* arrived at the conclusion that petitioner's Sunday visit was not for the benefit of the respondent by *weighing evidence concerning a disputed question of fact which the jury had decided in favor of petitioner and in regard to which there was probative evidence.* The majority compounded this prejudical and reversible error and the concomitant unconstitutional infringement thereby of petitioner's right of trial by jury by laborious contentions which ignore the substantial body of record evidence mentioned in the Statement of Facts, *supra,* and in point III, *supra,* evidence which entitled the jury to find a definite business advantage to respondent by the presence of petitioner on Sunday at the time and place of his injury. And again, on the point of benefit to respondent, the majority further compounded its unconstitutional invasion of the functions of the jury by, as the minority called them, *"factual contentions"* which are *"disputed by the record"* (Emphasis supplied). This most germane statement was immediately preceded by the following cogent and persuasive observation: "It appears that the opinion of the majority is somewhat in the nature of an argument upon the facts. This court does not ordinarily weigh the evidence." 3 Oh. St. at 175 and *infra,* p. 8a.

In view of the plethora of evidence of fact mentioned in the Statement of Facts, *supra* and in point III, *supra,* and of the findings of the jury that Petitioner's visit to the construction site was for a purpose incident to the performance of the contract between him and the respondent, it is respectfully submitted that this Court should hold that the Ohio Supreme Court exceeded permissible limits of appellate functions and invaded the province of the jury by its re-examining the facts submitted to

the jury and disagreeing with the jury's factual findings on this issue in favor of petitioner. The Court of Appeals stated "there is ample evidence to support each question of fact tried by the jury in the instant case. 197 N.E. 2d at 409 and *infra,* p. 33a.

In *Slocum* v. *New York Life Insurance Co.,* 228 U.S. 364, 33 S. Ct. 523 (1913), this Court held that the U.S. Circuit Court of Appeals, Third Circuit, had no authority, after a verdict, to *determine the facts submitted to the jury* and enter a judgment *non obstante verdicto.* The Court stated:

> "But, instead of ordering a new trial, as was required at common law, *the circuit court of appeals itself re-examined the issues, resolved them* in favor of the defendant, and directed judgment accordingly. This, we hold, could not be done consistently with the 7th Amendment, which not only *preserves the common-law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall re-examined otherwise than 'according to the rules of the common law'."* 228 U.S. at 399, 33 S. Ct. at 537 (Emphasis supplied.)

Attention may also be called to that part of the statement just quoted that Amendment VII "preserves the common-law right of trial by jury." And there is no need to cite authorities in support of the proposition that, at common law, questions of fact are for the jury.

The rule in *Slocum,* was followed by this Court in *Martha S. Young* v. *Central Railroad Co. of N.J.,* 232 U.S. 602, 34 S. Ct. 451 (1914).

At common law the only means to re-examine questions of fact tried by jury are by granting a new trial or a *venire facias de novo. Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830).

In *Dennis* v. *The Denver & Rio Grande Western Railroad Co.,* 375 U.S. 208, 84 S. Ct. 291 (1963), a lower state court in Utah rendered judgment for the plaintiff in a suit under

the Federal Employees' Liability Act, 45 U.S.C.A. § 51 *et seq.*, hereinafter referred to as the F.E.L.A. On appeal by the defendant, the Supreme Court of Utah vacated the jury verdict and ordered the entry of judgment for the defendant. On certiorari, this Court held that, where plaintiff's evidence, though vigorously disputed, was sufficient to support the jury's conclusion that defendant's negligence contributed to the injury, *the appellate court's function was exhausted, and it could not properly substitute its judgment for that of the jury* and decide that it was the plaintiff's own conduct that resulted in his injury.

The Court said:

> "But in FELA cases this Court has repeatedly held that where 'there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever the facts are inconsistent with its conclusion.' Lavender v. Kurn, supra, 327 U.S., at 653, 66 S. Ct. at 744, 90 L. Ed. 916. 'Only *when there is a complete absence of probative facts* to support the conclusion reached [by the jury] does a reversible error appear.' Ibid." 375 U.S. at 210, 84 S. Ct. at 293 (Emphasis supplied).

With respect to the underscored part in the statement just quoted, can anyone examining the record evidence in the Statement of Facts, *supra,* and in point III, *supra,* seriously contend that in the case at bar "there is a complete absence of probative facts to support the conclusion reached [by the jury]" that petitioner's Sunday visit was for the benefit of respondent and for a purpose incident to the performance of the contract between petitioner and respondent?

In *Dennis, supra,* the Court held:

> "In this case, petitioner's evidence, though *vigorously disputed,* was sufficient to support the jury's conclusion that respondent's negligence contributed to the injury. Hence, '*the appellate court's function* [*was*] *exhausted,* Lavender v. Kurn, supra, 327 U.S., at 653,

66 S. Ct. at 744, 90 L. Ed. 916, and it could not properly substitute its judgment for that of the jury and decide, as the Supreme Court of Utah did here, that 'it seems quite inescapable that it was [petitioner's] own conduct * * * that resulted in this regrettable injury.' 13 Utah 2d, at 255, 372 P. 2d. at 7." 375 U.S. at 210, 84 S. Ct. at 293. (Emphasis supplied).

The case referred to in the statement just quoted, *Lavender* v. *Kurn,* 327 U.S. 645, 66 S. Ct. 740 (1946), was an action under the F.E.L.A., *supra.* This Court held that in a suit for the death of a railroad switch tender, where there was basis in evidence for inferring that a mail hook switch from the side of a mail car struck the deceased and the jury made that inference, *the factual dispute on this point could not be relitigated in the reviewing court* and the fact that there was evidence tending to show that it was *physically and mathematically impossible* for the hook to strike the deceased and showing facts from which it might reasonably be inferred that the deceased was *murdered* was *irrelevant* on appeal.

In connection with the F.E.L.A., a question arises whether an employee was, at the time receiving an injury sued for, engaging in interstate commerce. Where the facts are in dispute or more than one inference can be drawn from them the question is for the jury. Twenty-two cases in support of this rule are cited in Note 1248 of 45 U.S.C.A. § 51, including the 1965 Annual Pocket Part. If the complexity of the issues whether one is engaged in interstate commerce in the myriads of situations that might be involved therein can be left to the jury, *a fortiori* the comparatively simpler question of fact whether petitioner's Sunday visit was for the benefit of the respondent and for a purpose incident to the performance of the contract between petitioner and respondent was properly left to the jury's decision in view of the existence of probative evidence on this point.

No case has been found in which this Court has held that the aforesaid F.E.L.A. rule regarding the determination of a question of fact by the jury is not applicable to other cases than those arising under the Act or has made a distinction between negligence under that Act and negligence in other cases so far as the right of trial by jury is concerned. As a matter of fact, as stated in *Slocum, supra,* p. 119, Amendment VII "preserves the common-law right of trial by jury.

That the interpretation of F.E.L.A., so far as the role of the jury is concerned, is not restricted to that Act, but may be applied in other cases is also known by *Continental Ore Co., et al.* v. *Union Carbide & Carbon Corporation, et al.,* 370 U.S. 690, 82 S. Ct. 1404 (1962). This was a private treble damage action under antitrust laws in which a judgment for the defendant was affirmed by the U.S. Court of Appeals, Ninth Circuit. In reversing the judgment of the lower court, this Court held that the lower court was wrong in taking the case away from the jury and not leaving it to the jury to decide whether the plaintiff partnership, engaged in the production and distribution of vanadium, was damaged by alleged monopolistic elimination of its independent suppliers by defendants, who were engaged in mining vanadium ore, processing vanadium and selling its products, whether the defendants refused to deal with the partnership and whether the partnership failed to take advantage of independent sources of supplies. On the basis of the F.E.L.A. rule concerning the role of the jury, this Court stated:

> "Undoubtedly, *all of the evidence* during this period *does not point in one direction* and *different inferences might reasonably be drawn from it.* There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.' Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520." 370 U.S. at 700, 82 S. Ct. at 1411. (Emphasis supplied).

The *Tennant* case, just cited, is an F.E.L.A. case and shows that the interpretation of that Act, so far as the role of the jury is concerned, is not restricted to that Act but may be applied in other cases. In *Tennant*, this Court held that, where an inference drawn by the jury that the railroad's negligence was the cause of the fatal accident to an employee had support in the evidence, an order for judgment for the railroad notwithstanding the verdict would be improper *as depriving the plaintiff of the right to a jury trial.*

The Court stated:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because *the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*
>
> "[9] Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus *to enter a judgment* for respondent *notwithstanding the verdict* is to *deprive petitioner of the right to a jury trial.* No reason is apparent why we should *abdicate* our *duty to protect and guard that right in this case.*" 321 U.S. at 35, 64 S. Ct. at 412 (Emphasis supplied).

It is respectfully submitted that this Court should reverse the judgment of the Supreme Court of Ohio, if for no other reason because that court, in the language of the statement just quoted, was "not free to reweigh the evidence and set aside the jury verdict" and thereby "to deprive petitioner of the right to a jury trial." On the issue whether petitioner's Sunday visit was for the benefit of respondent and for a purpose incident to the performance of the contract between him and petitioner, this rule as to the role of the jury is especially applicable in this case in view of the fact that the jury had already found for the petitioner on that issue and of the further fact that there was probative evidence on that issue.